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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 274

BACKUS PLYWOOD CORPORATION,

Petitioner,

against

COMMERCIAL DECAL, INC. and ALFRED DUHRSSEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' MEMORANDUM

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POINT I

The decision of the Court of Appeals affirming a District Court summary judgment for respondents involves no legal isssues of great importance, conflicts with no decisions in other circuits and does not warrant further consideration by this Court.

Petitioner's complaint alleged three causes of action (pp. 2-6).* By its first cause of action, against both respondents (a corporation and its president), petitioner asks damages for breach of an oral agreement described by petitioner as one of "joint venture". Its second cause of action, against the individual alone, seeks damages for his failure to compel the corporation to enter into the "joint venture". The third cause of action alleges that the individual fraudulently misrepresented that he controlled the corporate respondent.

The terms of the alleged "joint venture" agreement are set forth in petitioner's written offer (Exhibits A and A1, pp. 24-29), to form a corporation which would buy the corporate respondent's goods, machinery and goodwill, rent its real estate for five years (under a lease to be guaranteed by petitioner) and hire the individual respondent for four years and eight months. Concededly the offer was never accepted in writing.

Under various New York statutes, commonly called, collectively, the Statute of Frauds (App. pp. 2-4) oral agreements to lease real estate for more than a year, to purchase property of a value in excess of $500, agreements of guaranty and agreements not to be performed within a year are unenforceable. Petitioner urges that the oral agreement sued on is none of the prohibited agreements but rather a combination of all of them. Petitioner then asserts (without authority) that such a combination

* Page references alone are to the appendix in the Court of Appeals. When preceded by "App." reference is to the Appendix to Petitioner's brief in this Court.

constitutes a "joint venture". From the premise thus conceived, petitioner moves its argument to a rule of law, for which it cites no precedent, that "joint ventures of whatever nature" are not within the purview of the Statute of Frauds and consequently may be enforced though oral.

Both the District Court (65-81) and the Court of Appeals (App. 6-12) held, in clearly stated opinions well supported by precedents, that whatever tag appellant might place upon the alleged agreement, it was unenforceable under the Statute of Frauds. Neither court, therefore, had to reach a second question presented by appellant's view of the matter, viz. whether there can ever be a joint venture, where, as here, there is no sharing of profits and losses between the parties, no joint control of the assets and the business.

Petitioner's argument (Point I) that the decision below is in conflict with decisions of Courts of Appeals in other Federal Circuits presents no basis for a writ of certiorari to this Court because the legal issues presented are purely local, involving only the statutes and Common Law of New York. While Rule 19 of the Rules of this Court authorizes certiorari when the decision below is in "conflict with the decision of another court of appeals", the conflict to which reference is made must be on a question of Federal law as to which this Court has the last word. On interpretation of State statutes, involving no Federal constitutional question, it is the State court—in this case the New York Court of Appeals—which would make the final decision. (In passing we note, as did the Court of Appeals (App. 11), that in fact there is no real conflict between circuits. The two decisions in other circuits cited by petitioner (Pet. Brief, pp. 14-15) related to joint ventures wherein the joint venturers were jointly to buy property from a third party. In the instant case, the purchase and lease, under the alleged agreement, was by one "joint venturer"—or its wholly owned corporation—of the property of the other.)

POINT II

Dismissal by the Court of Appeals of petitioner's appeal from the judgment in favor of the individual respondent does not affect substantial rights of any party.

While only the first cause of action is against the corporate respondent, all three causes are against the individual respondent. Appeal from the summary judgment of the District Court striking the first and second causes of action against the individual respondent was dismissed by the Court of Appeals on the grounds that the granting of summary judgment on two of three causes of action did not wholly terminate petitioner's action against the individual respondent—and therefore, was not appealable under Section 54B of the Federal Rules of Civil Procedure.

The dismissal of the appeal is not of such importance as to warrant further review at this time in this case. It is not a final appellate adjudication of petitioner's rights. It simply defers finality until petitioner's third cause of action has been disposed of. In any case, the law on the first cause of action against the individual as well as the corporation was, in our opinion, settled by the appellate court's affirmance of the judgment dismissing the complaint as to the corporate defendant. The law as to the second cause of action will follow under the rule of *stare decisis*. Even if certiorari were granted and the Court of Appeals were thereafter directed by this Court to pass on the appeal, affirmance of the judgment would follow as a matter of course. Petitioner, therefore, can gain nothing by the writ requested.

Respectfully submitted,

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